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No.
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In the Supreme Court

OF THE

United States

LAFFIT PINCAY, JR. AND CHRISTOPHER J. MCCARRON,
Petitioners,

VS.

VINCENT S. ANDREWS, ROBERT ANDREWS, and,
VINCENT ANDREWS MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a suit against fiduciaries alleging mail and wire fraud in violation of 18 U.S.C.S. §§ 1961-1968, the Racketeering Influence and Corrupt Organizations Act as amended before the Private Securities Litigation Reform Act of 1995, [Pub.L.No. 104-67, § 107, 109 Stat. 737, 1758 (1995)], the jury's rejection of the fiduciaries' assertion of the statute of limitations mandates a finding for petitioners regarding that defense.

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Laffit Pincay, Jr. and Christopher J. McCarron respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The court of appeals' opinion is at 238 F.3d 1106 (9th Cir. 2001)[1], but the court did not publish the decision denying rehearing.[2] The district courts' decisions are unpublished.[3]

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C.S. § 1254(1). More specifically, on February 6, 2001 the court of appeals entered its judgment. On March 28, 2001, it denied petitioners' timely filed request for rehearing and suggestion for rehearing en banc.

STATUTES

This petition involves 18 U.S.C.S. §§ 1961, 1962(c), 1964(c)(as amended 1984), and 1965(a), (b), and (d) of the Racketeering Influence and Corrupt Organizations Act ("RICO"), and 18 U.S.C.S. § 1341 and § 1343.[4]

STATEMENT OF THE CASE

In 1989 petitioners sued respondents Vincent S. Andrews, Robert Andrews, and Vincent Andrews Management Corporation ("VAMC") in the United States District Court for

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[1] See also Appendix A.

[2] Appendix at B.

[3] Appendix at C and D.

[4] Appendix at E.

the Central District of California. Relevant here, petitioners invoked the district court's original jurisdiction under 28 U.S.C.S. § 1331 because, while acting as petitioners' fiduciaries, respondents separately associated together as a RICO enterprise that used the mail and telephone to obtain money from petitioners by fraudulent representations and concealment.

In 1992 the jury ruled in favor of petitioners. Relevant here, the jury rejected respondents' assertion of the statute of limitations. Among other facts supporting the jury's decision, the record shows the following.

Respondent Vincent S. Andrews orally agreed with Pincay in 1969 (the year Pincay turned twenty-three years old) that for a total of 5% of Pincay's yearly income, Vincent S. Andrews would manage and invest Pincay's money.[5] Pincay had the same oral agreement with Vincent S. Andrews' father, who had managed and invested Pincay's money from 1967 until 1969.[6]

Vincent S. Andrews used respondent VAMC's employees to do several of the services for Pincay, including but not limited to depositing checks, paying bills, balancing checkbooks, preparing tax returns. The 5% of Pincay's yearly income was paid to VAMC.[7] In 1972, respondent Robert Andrews (Vincent S. Andrews' brother) began working for VAMC. He thereafter became (1) a shareholder, director and officer of VAMC, and (2) the sole shareholder of Andrews & Company Inc., a Connecticut corporation that he used for consulting and management work in real estate.

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[5] Pincay was, and continues to be, a professional thoroughbred jockey, which is a hazardous and physically rigorous occupation demanding Pincay's full attention.

[6] The father died in 1969.

[7] Vincent S. Andrews owned and operated VAMC, which he organized as a New York corporation in 1969.

Vincent S. Andrews and Robert Andrews were separately and personally involved in finance and real estate endeavors apart from VAMC.

Unknown to Pincay, beginning in 1972 Vincent S. Andrews, Robert Andrews and VAMC separately associated together to deceive Pincay into investing in many partnerships in which either Vincent S. Andrews, Robert Andrews, or VAMC had a personal financial interest. They used their fiduciary relationships with Pincay to lull him into a sense of trust or security so that he would not suspect the respondents' scheme. As an example of Pincay's level of trust, in his will he named Vincent S. Andrews the executor. Moreover, respondents knew that Pincay was unsophisticated about financial matters.

Vincent S. Andrews would telephone Pincay to describe the investment and recommend very strongly that Pincay invest. He intentionally did not tell Pincay, however, that he (or Robert Andrews, or VAMC) had a personal financial interest in the investment, and that the investment would use part of Pincay's money to pay compensation to Vincent S. Andrews, Robert Andrews, or VAMC in addition to the 5% of Pincay's yearly income.

The respondents intentionally withheld the investment documents from Pincay until after (1) Vincent S. Andrews persuaded Pincay to invest during the phone call, and (2) Pincay had signed and returned the check prepared by respondents for the investment. Respondents would then mail, and occasionally have a messenger deliver, the investment documents to Pincay for signature.[8]

Pincay could not understand the documents. For example, Pincay left school in Panama after the ninth grade. He spoke Spanish as his first language. Moreover, when he told

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[8] Respondents affixed post-it arrows directing Pincay where to sign.

Vincent S. Andrews that he could not understand the documents, Vincent S. Andrews said that Pincay should not bother reading the documents because he, Vincent S. Andrews, had already analyzed them and he would not put Pincay into any investment that would hurt Pincay. After Vincent S. Andrews said that, Pincay did not read the investment documents. Moreover, respondents never explained the documents to Pincay, and never disclosed that the investments were using part of Pincay's money to pay compensation to one or more of the respondents in addition to 5% of Pincay's yearly income.

The jury determined that respondents' fraud caused $670,685 in damages to Pincay, including the loss of money caused by twenty-nine investments that Pincay would not have approved but for the respondents' mail and wire fraud. Moreover, the jury determined, in effect, that Pincay did know and should not have known of his RICO injury more than four years before he sued petitioners.

Regarding McCarron, Vincent S. Andrews and McCarron orally agreed in 1979 (the year McCarron turned twenty-four years old) that Vincent S. Andrews would invest McCarron's money, the VAMC employees would handle McCarron's bookkeeping, and the accountants would handle the tax preparation, all for not more than 5% of McCarron's yearly income.[9] McCarron did not know, however, that Vincent S. Andrews, Robert Andrews, and VAMC separately associated together to deceive McCarron into investing in partnerships in which Vincent S. Andrews, Robert Andrews, or VAMC had a personal financial interest. Without repeating the details here, respondents used, in essence, the same mail and wire fraud scheme on McCarron that they used on Pincay. McCarron completely trusted the

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[9] McCarron also was, and continues to be, a professional thoroughbred jockey.

respondents. In his will, he also named Vincent S. Andrews the executor.

McCarron had a high school education, was unsophisticated about financial matters, and he did not understand the investment documents. When he told Vincent S. Andrews that he could not understand the documents, Vincent S. Andrews said not to bother reading them because the documents had already been analyzed. Moreover, respondents never explained the documents to McCarron, and never disclosed to him that the investments were using part of his money to pay compensation to one or more of the respondents in addition to 5% of his yearly income.

The jury determined that the respondents' fraud caused a total of $313,841 in compensatory damages to McCarron, including the money lost from the thirteen investments McCarron would not have approved but for the respondents' mail and wire fraud. The jury also decided, in effect, that McCarron did not know and should not have known of his RICO injury before 1985.

After the district court entered the judgments, respondents filed a motion for judgment as matter of law contending, in relevant part, that petitioners filed the RICO claims too late. After the hearing on the motion, but before the district court ruled, respondents filed bankruptcy. Over a year later, the bankruptcy court allowed the case to resume.

The district court reviewed the record and found it supported the jury's decision that respondents timely filed the RICO claims.[10] The district court, however, granted VAMC judgment as a matter of law on other grounds, and, therefore, vacated the judgments.[11] In August of 1997, the district court reconsidered its ruling and denied all of the

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[10] Appendix at C-14.

[11] Appendix at C-17 and 18.

respondents' post trial motions.[12] In 1998, the district court again entered judgments on the RICO claims. The respondents filed an appeal.

Among other issues, respondents argued that the Private Securities Litigation Reform Act of 1995[13], and the statute of limitations, precluded the RICO claims as a matter of law. The court of appeals rejected the first argument.[14] The court ruled, however, that the RICO claims were filed too late because, according to the court, before 1985 the statute of limitations started running, as a matter of law, as soon as petitioners received and signed documents that the court interpreted to be a written disclosure of the RICO injury.[15] On that basis, the court of appeals reversed the judgments.[16]

Petitioners requested a rehearing, and suggested a rehearing en banc. The court of appeals denied the requests.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision conflicts with *Fujisawa Pharmaceutical Co. Ltd. v. Kapoor,* 115 F.3d 1332 (7th Cir. 1997), *McCool v. Strata Oil,* 972 F.2d 1452 (7th Cir. 1992), *Great Rivers Co-Op of S.E. Iowa v. Farmland Indus.,* 120 F.3d 893 (8th Cir. 1997), and *Davidson v. Wilson,* 973 F.2d 1391 (8th Cir. 1992). The conflict pertains to a recurring

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[12] Appendix at D-11 through 13.

[13] Pub.L.No. 104-67, § 107, 109 Stat. 737, 1758 (1995).

[14] *Pincay v. Andrews, supra.,* 238 F.3d at 1108 n. 1, citing *Scott v. Boos,* 215 F.3d 940, 942-49 (9th Cir. 2000).

[15] *Pincay v. Andrews, supra.,* 238 F.3d at 1110. The documents referred to by the court of appeals are in Appendix at F, G, H, I, and J.

[16] The court of appeals did not reach any of the other issues raised by the parties, such as petitioners' cross-appeal that questioned the district court's refusal to also include in the judgments the state law punitive damages awarded by the jury. *Id.* at 1110.

situation in federal civil litigation involving the "injury discovery accrual rule." Accordingly, the need for guidance from this Court is acute. This case is a timely opportunity to provide that guidance after *Rotella v. Wood,* 528 U.S. 549 (2000).

I.

COURT OF APPEALS' DECISION CONFLICTS WITH SEVENTH CIRCUIT'S AND EIGHTH CIRCUIT'S "NO BARE ACCESS ACCRUAL" RULE

The Seventh Circuit holds that "bare access to necessary information" does not start the statute of limitations running as a matter of law. 115 F.3d at 1335; 972 F.2d at 1456 and 1463. The Eighth Circuit agrees. 120 F.3d at 897; 973 F.2d at 1393 and 1400.

To trigger the duty to access the "necessary information," both Circuits require undisputed evidence that (1) a suspicious circumstance occurred, (2) the suspicious circumstance was sufficient to prompt accessing the information, and (3) the plaintiff was aware of that suspicious circumstance.[17] For example, in *McCool,* the plaintiffs acknowledged that they knew of the discrepancy between the agreements they signed and the unredacted reports the defendant sent them a year later. Simply put, the plaintiffs

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[17] See also *Ritchey v. Horner,* 244 F.3d 635, 640-41 (8th Cir. 2001) ("But the facts relied upon to support inquiry notice must rise to a level of more than mere suspicion; they must instead be 'sufficiently confirmed or substantiated' to a point at which the victims are incited to investigate . . . What effect the relationship may have had on how plaintiffs viewed what (the defendants) told them cannot be adequately adjudged on summary judgment. Consequently, we cannot say as a matter of law that (the defendants') statements were 'unconvincing' and that plaintiffs should have been led to investigate.")

admitted knowing years before they sued that "something was clearly amiss."[18]

In *Fujisawa,* the plaintiff-pharmaceutical corporation received and signed documents when it purchased the defendant-drug manufacturer. The plaintiff subsequently sued the defendant alleging violations of RICO, and federal securities statutes. Although claiming it did not become aware of the fraud until the FDA began an investigation of the defendant, the plaintiff did not dispute it knew among other facts that years before it sued (1) the FDA cited the defendant for many violations, and (2) the FDA seized the defendant's products.[19]

The Eighth Circuit in *Great Rivers* noted that the plaintiff admitted he knew the defendant's newsletter clearly explained to him that, in effect, the defendant was in a Colorado class action lawsuit based on the same injury and misrepresentation about which the plaintiff complained.[20] In *Davidson* the plaintiffs acknowledged they were sophisticated investors, and knew a substantial discrepancy existed between the investment document they signed and the Schedule K-1 that the defendant subsequently sent them. The K-1 directly contradicted what the agreement said about the allocation of partnership tax losses and cash distributions.[21]

In sharp contrast, no undisputed evidence in the record shows conclusively that before 1985 either that the petitioners were aware of a suspicious circumstance, or that the respondents clearly disclosed that petitioners were paying more than 5% of their yearly income for the services

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[18] *McCool, supra.,* 972 F.2d at 1463.

[19] *Id.* at 1336-37.

[20] *Great Rivers, supra.,* 120 F.3d at 897-98.

[21] *Davidson, supra.,* 973 F.2d at 1394, 1400.

provided by respondents. Accordingly, if the Seventh Circuit and the Eighth Circuit reviewed this case, both would agree with the district court here that the statute of limitations did not start running as a matter of law when petitioners received and signed documents before 1985.

To be sure, the Seventh Circuit and Eighth Circuit cases cited above also involve a one year period of repose.[22] Nevertheless, that fact does not diminish the importance of the conflict with the court of appeals' decision. Whether the limitation period is one year or four years, the "no bare access accrual" rule applies.[23] Also, the question of what facts the victim actually knew is material to the objective standard for inquiry notice that is used in the Eighth Circuit and Seventh Circuit. For example, in *Great Rivers,* the Eighth Circuit stated the following: "Farmland argues that we should engage only in the second and third prongs of (the objective standard for inquiry notice) analysis we have set forth, because, according to Farmland, the question of what the victim actually knows is immaterial to our objective standard for inquiry notice. Thus, Farmland would have us *automatically* impute to (the victim) constructive knowledge of any information available . . . regardless of (the victim's) actual awareness. We cannot adopt (Farmland's) analysis . . ."[24]

Accordingly, though many documents petitioners received and signed were agreements, and the parol evidence rule bars the consideration of evidence contradicting the terms of an integrated agreement, well-settled law holds that the issue of whether documents formed such an integrated

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[22] See, e.g., *Fujisawa, supra.,* 115 F.3d at 1335.

[23] *Ibid; Great Rivers, supra.,* 120 F.3d at 897. See also *McCool, supra.,* 972 F.2d at 1456, 1463; *Davidson, supra.,* 973 F.2d at 1394, 1400.

[24] *Great Rivers, supra.,*120 F.3d at 897, citing *Fujisawa, supra.,* 115 F.3d at 1335, 1336-37.

agreement is a question of fact that all the evidence must determine.[25] The record in this case supports a finding that no agreement existed, let alone an integrated one, that Pincay and McCarron would pay more than 5% of their yearly income for the services provided by respondents.[26] Similarly, though cases often say that a person's signature on a contract raises a presumption that the person knew and understood the contents of the contract and agreed to its terms,[27] the presumption is not conclusive.[28]

Finally, while the Seventh Circuit holds that defendants must prove inquiry notice,[29] and the Eighth Circuit holds that plaintiffs must prove "no inquiry notice,"[30] both Circuits would arrive at the same point of agreement about this case: the jury's rejection of respondents' assertion of the statute of limitations mandates a finding for petitioners regarding that defense.

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[25] See, generally, Restatement Contracts (2d) § 209, Comment: *c Proof of integration* (1981).

[26] See, e.g., Appendix at F, G, H, I, and J.

[27] See, generally, 29 Am Jur 2d Evidence § 282 (2000).

[28] See, e.g., *Andrews v. Congar,* 102 U.S. 107 (1880) ("In this way, it seems to us, the case upon this point was fairly put to the jury . . . If the presumption arising from their indorsement had been overcome by the evidence, the jury were told in express terms to find accordingly.") *Id.* at 108; *De Cordova v. Hood,* 84 U.S. 1, 6-7 (1873); Federal Rules of Evidence § 301. See also *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993) ("The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own evidence and through cross-examination of the defendant's witnesses . . . that [he] has been the victim of (fraud)." *Id.* At 506-08.).

[29] *Tregenza v. Great American Communications Co.,* 12 F.3d 717, 718-19 (7th Cir. 1993), cert. denied 511 U.S. 1085 (1994).

[30] *Davidson, supra.,* 973 F.2d at 1402, n.8 (8th Cir. 1992).

The Seventh Circuit would hold that evidence of petitioners receiving and signing the documents to which the court of appeals referred is not enough to presume conclusively that the statute of limitations started running more than four years before petitioners sued. Accordingly, petitioners would have, as the district court allowed here, a full and fair opportunity to demonstrate through the presentation of their own evidence that they did not have inquiry notice before 1985. Petitioners' evidence having been presented, the jury proceeded to decide the ultimate question: whether respondents proved petitioners had inquiry notice because they received and signed documents before 1985. The jury's rejection of respondents' argument (particularly since evidence of respondents' mendacity accompanied the rejection) suffices to show that petitioners did not have knowledge of facts that would trigger the duty to inquire before 1985. Thus, rejection of the respondents' proffered reasons for why petitioners had that knowledge permits the jury to infer the ultimate fact of no inquiry notice, and, therefore, that petitioners did not have constructive knowledge of the RICO injury before 1985.[31] The Seventh Circuit would rule, therefore, that the jury and the district court are right and their decisions mandate a finding for petitioners regarding the statute of limitations.

The Eighth Circuit would agree with the Seventh Circuit, but from a different angle, namely, that petitioners presented enough evidence to prove they did not have inquiry notice before 1985, and, therefore, the jury's finding on that issue scotches the respondents' assertion of the statute of limitations.

In sum, the court of appeals' decision contradicts the Seventh Circuit and the Eighth Circuit's "no bare access

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[31] Cf. *St. Mary's Honor Center, supra.*, 509 U.S. at 511; *Andrews, supra.*, 102 U.S. at 108.

accrual" rule. The Court should grant Pincay and McCarron's petition to review this important conflict.

II.

OTHER FEDERAL COURTS SUPPORT THE SEVENTH CIRCUIT'S AND EIGHTH CIRCUIT'S RULE

The First Circuit in *Dodds v. Cigna Securities, Inc.*[32] noted that the victim acknowledged that the single page disclosure documents she signed explicitly warned her about the conditions she alleged in her complaint. "Most of the forms prominently state near the top: 'I fully understand the illiquid nature of an investment in [the limited partnership] and that no secondary market is likely to exist for limited partnership units.' "[33]

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[32] 12 F.3d 346 (2nd Cir. 1993), cert. denied 511 U.S. 1019 (1994).

[33] *Id.* at 351. The Second Circuit also cited *De Bruyne v. Equitable Life Assur. Soc. of the U.S.*, 920 F.2d 457 (7th Cir. 1990), which stated that "plaintiffs cannot avoid the statute of limitations by possessing, but failing to read, the documents that would put them on inquiry notice." *Id.* at 466 n.18. In that case, however, the plaintiffs were participants in the ABA Members Retirement Plan who admitted that they " 'suspected that the Balanced Fund was unbalanced in mid-October, 1987,' more than a year before they filed suit. In their reply brief, plaintiffs admit(ed) that Debruyne received a document in mid-November that made him 'suspicious.' And if those statements alone are insufficient, Equitable's consistent and continuous precrash disclosure also gave rise to a duty of inquiry on the part of plaintiffs." *Id.* at 466. No undisputed evidence such as that is in the record here. Simply put, Pincay and McCarron were unsophisticated about financial matters; they denied that the investment documents made them suspicious; Vincent S. Andrews, their trusted fiduciary, persuaded them not to read the documents; respondents never disclosed to Pincay and McCarron, let alone consistently or continuously, that the compensation from the investments was on top of 5% of Pincay's and McCarron's yearly income.

Here, none of the documents stated, let alone explicitly or prominently, that Pincay and McCarron understood that the compensation referred to in the documents was in addition to 5% of their yearly income.[34]

In *Armstrong v. McAlpin*[35] the Second Circuit noted that the allegations of the plaintiffs' complaint simply lifted statements from a Peat Marwick & Mitchell audit report, which the SEC made public in a complaint that began a well-publicized action against the defendants years before the plaintiffs sued.[36] The plaintiffs admitted, in effect, that they knew and understood the audit report and the SEC complaint.

The First Circuit in *Cooperativa De Ahorro v. Kidder, Peabody & Co.*[37] started the statute of limitations running as a matter of law as to a plaintiff-savings and loan because no dispute existed that years before suing the defendant (1) the plaintiff received and knew that the defendant's account summary directly disclosed that bonds purchased between June and December of 1986 had lost 10 percent of their value, (2) the plaintiff received and knew that the defendant's letter (which accompanied the account summary) stated, in effect, that the defendant would analyze the loss in more detail, and (3) a month after receiving both the account summary and the letter, the plaintiff called the defendant's former broker to ask why the bonds had lost value.[38]

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[34] See Appendix at F, G, H, I, and J.

[35] 699 F.2d 79 (2nd Cir. 1983).

[36] *Id.* at 88.

[37] 129 F.3d 222 (1st Cir. 1997).

[38] *Id.* at 223.

Several decisions from other courts of the Ninth Circuit support the Seventh Circuit and the Eighth Circuit.[39] Indeed, *Volk v. D.A. Davidson & Co.*,[40] which the court of appeals cited,[41] based that decision on the fact that plaintiffs were coal mine investors who did not deny that they were sophisticated, and that they understood the statements in the documents provided by the defendant.[42] Indeed, the documents clearly informed the plaintiffs that they had purchased investments in coal reserves, which lacked mineable coal and could not sustain a viable commercial operation.[43] In other words, no dispute existed that the documents directly disclosed to the plaintiffs, and that the plaintiffs knew, that "they paid more for their investment than it was worth."[44]

Pincay and McCarron denied they were sophisticated investors, and denied they understood the documents they received and signed. After considering all the evidence including watching and listening to Pincay and McCarron testify, the jury concluded that Pincay and McCarron did not know and should not have known that the compensation

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[39] See, e.g., *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436-37 (9th Cir. 1984) and later at 803 F.2d 454, 459-61 (9th Cir. 1986); *Hilton v. Mumaw*, 522 F.2d 588, 595-97, 601-02 (9th Cir. 1975) (see, e.g.,: "Hiltons argue that W.C. Mumaw lacked notice of the fraud underlying the 1957 and 1958 contracts because he could reasonably rely on his fiduciary relationship with Mumaws. This argument is not so doubtful that it may be taken from the jury." *Id.* at 595.); *Luksch v. Latham*, 675 F.Supp. 1198, 1201-04 (N.D.Cal. 1987).

[40] 816 F.2d 1406 (9th Cir. 1987).

[41] *Pincay v. Andrews, supra.*, 238 F.3d at 1109-10.

[42] *Volk, supra.*, 816 F.2d at 1409-1411, 1417.

[43] *Id.* at 1417.

[44] *Ibid.*

referred to in the documents was in addition to the 5% of their yearly income.

In *Beneficial Standard Life Ins. Co. v. Madariaga*[45] (which the court of appeals cited besides *Volk*[46]) triable issues of fact existed about whether the plaintiff-insurance company should have known of the defendants' schemes when the plaintiff investigated its own employee more than four years before suing the defendants. Stated another way, the information developed by the plaintiff's investigation proved that, years before suing, it was aware of that about which it was complaining.[47]

In sum, the court of appeals' decision contradicts decisions of other federal courts that support the Seventh Circuit and the Eighth Circuit's "no bare access accrual" rule.

III.

PENDING AND FUTURE LITIGATION AFFECTED

Apart from the actual litigants here, the conflict between the Court of Appeals' decision and the "no bare access accrual" rule of the Seventh Circuit and the Eighth Circuit affects future and pending federal litigation involving the statute of limitations. The parties and the federal courts will, therefore, depend on whether this Court agrees with the view of the Seventh Circuit and the Eighth Circuit, or that of the court of appeals here. Moreover, given the recurring nature of the issue, no end to the debate is in sight unless this Court grants certiorari. Whatever this Court determines to be the correct answer, however, the questions raised by this petition are federal questions that this Court should

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[45] 851 F.2d 271 (9th Cir. 1988).

[46] *Pincay v. Andrews, supra.*, 238 F.3d at 1110.

[47] *Beneficial, supra.*, 851 F.2d at 275-76.

determine. Indeed, unless the Court grants the petition and resolves the conflict, many parties will also find themselves entrusting the resolution of the conflict to state courts.[48]

To be sure, this Court in *Wood v. Carpenter* said that "[t]he means of knowledge are the same thing in effect as knowledge itself."[49] The Court subsequently noted, however, that *Wood v. Carpenter* construed Indiana's statute of limitations by following what the Indiana Supreme Court ruled.[50] Accordingly, the Sixth Circuit concluded that *Wood v. Carpenter* is limited to construing Indiana law.[51] Moreover, as discussed above, the Seventh Circuit and Eighth Circuit make it clear that the question of whether a victim had the "means of knowledge" is by its terms a factual analysis, and, therefore, a fact finder may decide, based on all the evidence, which side prevails on that issue.[52]

Respondents might argue that the court of appeals' decision serves RICO's policy of encouraging victims to investigate diligently. To be sure, *Rotella* recognized that policy.[53] The court of appeals' decision, however, does too much automatically. First, it does not consider, for example, that the existence of a fiduciary relationship often lulls the beneficiary into a sense of trust or security, such that a document received and signed by the beneficiary may not

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[48] See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

[49] *Wood v. Carpenter*, 101 U.S. 135, 143 (1879).

[50] *Rosenthal v. Walker*, 111 U.S. 185, 190-91 (1884).

[51] *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1468 (6th Cir. 1988), cert. denied sub nom. *Pinney Dock and Transport Co. v. Norfolk & Western R. Co.*, 488 U.S. 880 (1988).

[52] *Great Rivers, supra.*, 120 F.3d at 897; *Fujisawa, supra.*, 115 F.3d at 1335. See also *Ritchey, supra.*, 244 F.3d at 640-41.

[53] *Rotella, supra.*, 528 U.S. at 557-58.

excite the beneficiary's suspicion about the fiduciary.[54] Second, the beneficiary's unsophistication, which is often the very reason that people hire or appoint fiduciaries in the first place, often causes the beneficiary not to suspect the fiduciary at all.[55] Finally, it does not consider that when the defendant chose the wording of the document, the defendant might provide more carefully for the protection of the defendant's own interests than for those of the unsophisticated victim. The defendant is also more likely than the unsophisticated victim to have reason to know of uncertainties of the meaning of the words the defendant chooses. Indeed, the defendant may leave the meaning deliberately obscure, intending to decide later what meaning to assert.[56]

In sum, this petition presents an appropriate opportunity for the Court to address important questions of federal law that have caused conflict between the court of appeals here and other federal courts.

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[54] Cf., e.g, *Vucinich, supra.*, 739 F.2d at 1436-37 and later at 803 F.2d 459-61; *Hilton, supra.*, 522 F.2d at 595-97; *Luksch, supra.*, 675 F.Supp. at 1202-03.

[55] *Ibid.*

[56] Cf. *Bailey v. Glover,* 88 U.S. 342 (1874) ("To hold that . . . by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the . . . the means by which it is made successful and secure." *Id.* at 349.).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 25, 2001

APPENDIX A

LAFFIT PINCAY, JR;
CHRISTOPHER J. MCCARRON,
Plaintiffs-Appellees-Cross-Appellants,
v.
VINCENT S. ANDREWS; ROBERT L. ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,
Defendants-Appellants-Cross-Appellees.

Nos. 98-55217, 98-55288, 98-55449

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

238 F.3d 1106; 2001 U.S. App. LEXIS 1553

October 2, 2000, Argued and Submitted,
Pasadena, California

February 6, 2001, Filed

[*1107]

David Boies, Boies, Schiller & Flexner, Armonk, New York, for the defendants-appellants/cross-appellees.

Neil Papiano, Iverson, Yoakum, Papiano & Hatch, Los Angeles, California, for the plaintiffs-appellees/cross-appellants.

Appeal from the United States District Court for the Central District of California; Wm. Matthew Byrne, Jr., Senior District Judge, Presiding. D.C. No. CV-89-01445-WMB.

Before: O'Scannlain, Fernandez, and Rawlinson, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether the civil Racketeer Influenced and Corrupt Organizations Act ("RICO") statute of limitations begins to run, as a matter of law, upon receipt of written disclosure of the alleged injury.

I

Lafitt Pincay and Christopher McCarron are professional horse racing jockeys who have been inducted into the sport's Hall of Fame. Vincent Andrews ("Vincent"), Robert Andrews ("Robert"), and their company, Vincent Andrews Management Corporation ("VAMC") (collectively "Andrews"), are investment advisors whom both Pincay and McCarron retained between 1969 and 1988.

Pincay began investing the earnings from his racehorse riding in 1967, when he orally employed Vincent's father, also named Vincent Andrews, to manage his financial affairs for a flat fee of 5% of his annual income. Pincay orally continued this arrangement in 1969, including the 5% flat fee, when Vincent took over his father's business and formed VAMC. In 1972, Vincent's brother, Robert, joined VAMC. Pincay's arrangement with VAMC called for the firm to handle Pincay's financial, accounting, and tax matters. McCarron orally entered into the same arrangement with VAMC, including the 5% flat fee, beginning in 1979. Pincay terminated his arrangement with VAMC in 1987 and McCarron did so in 1988.

Throughout their arrangements with VAMC, the firm recommended to Pincay and McCarron dozen of investment opportunities, and they partook in many of these. Many were ventures in which Robert, Vincent, or VAMC held a stake. For example, in some ventures the Andrews held a partnership interest, and in others they would be paid compensation based on the amount of capital invested in the

venture. Many of these came with written disclosure of the Andrews' financial interest. For example, a document associated with one venture, dated 1972 and signed by Pincay, binds Pincay to pay "Andrews & Co." 10% of the capital distribution of the venture. Another, dated 1984 and signed by McCarron, lists Andrews & Co., a "corporation controlled by Robert Andrews," as the managing partner of the venture. A similar document, dated 1984 [*1108] and signed by Pincay, explains that the managing partner, listed as Andrews & Co. "controlled by Robert Andrews," will receive a management fee equal to a fraction of the amount invested in the venture. Perhaps the most explicit is a document, dated 1980 and signed each by Pincay and McCarron, which notes that Robert "will receive compensation from the [venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors."

In 1989, after they had terminated their arrangements, Pincay and McCarron sued the Andrews in the Federal District Court for the Central District of California. They alleged various state law claims, including breach of contract and breach of fiduciary duties, as well as mail and wire fraud violations of RICO. Their theory of RICO liability argued that the Andrews had committed mail and wire fraud by taking, in violation of their oral agreements, more than 5% of their annual income, in the form of the payments the Andrews additionally received from the ventures in which they invested. The jury returned verdicts on both the state and RICO claims against Vincent, Robert, and VAMC. The jury found that Pincay would not have invested in 29 ventures, and McCarron would not have invested in 13 ventures, but for the Andrews' unlawful conduct. The jury awarded Pincay $670,685 and McCarron $313,000 in compensatory damages for their state and RICO claims. Pincay also received $2.25 million, and McCarron roughly $1.3 million, in punitive damages for the state law violations. The

district court awarded Pincay $603,967 and McCarron $255,986 in attorneys fees under RICO. At the court's behest, Pincay and McCarron elected to treble their compensatory damages under RICO in lieu of the compensatory and punitive damages available under state law.

The Andrews filed a renewed motion for judgment as a matter of law and a motion for a new trial, in which they argued that the statute of limitations had run and that there was insufficient evidence both to support a RICO claim and to support the amount of damages awarded. The district court denied these motions. The Andrews filed a timely notice of appeal and argue that their motions were improperly denied. Pincay and McCarron filed a timely notice of cross-appeal and argue that they should not have been forced to elect either RICO treble damages or state law punitive damages. The appeals were consolidated before this court.

II

We first address the Andrews' argument that the statute of limitations had run prior to the time Pincay and McCarron filed their suits in 1989. n1 The jury concluded that the statute of limitations had not run.

> n1 The Andrews argued that, as a threshold matter, Pincay and McCarron's RICO claims were precluded by retroactive application of a provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. No. 104-67, § 107, 109 Stat. 737, 1758 (1995). We recently concluded, however, that this provision cannot be applied retroactively. *See Scott v. Boos, 215 F.3d 940, 942-49 (9th Cir. 2000).*

The statute of limitations for civil RICO actions is four years. n2 *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156, 97 L. Ed. 2d 121, 107 S. Ct.*

2759 (1987). Pincay entered into the agreement for investment management services with VAMC in 1969 and McCarron did so in 1979. Pincay and McCarron invested in ventures from which the Andrews stood to make a profit throughout the 1970s and 1980s. Yet, Pincay and McCarron did not file their suits until 1989.

n2 For some reason, the jury was instructed that the statute of limitations was three years, rather than four years. This error does not matter for this appeal, however, because the jury's conclusion that a three-year statute of limitations did not run means that *a fortori* it would have concluded that the four-year statute of limitations had not run.

[*1109] We have continuously followed the "injury discovery" statute of limitations rule for civil RICO claims. *See Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996)*. n3 Under this rule, "the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Id. at 510* (internal quotation marks omitted). Thus, the "injury discovery" rule creates a disjunctive two-prong test of actual or constructive notice, under which the statute begins running under either prong.

n3 Although the Supreme Court has overruled other statute of limitations standards for civil RICO, *see Rotella v. Wood, 528 U.S. 549, 120 S. Ct. 1075, 1080, 145 L. Ed. 2d 1047 (2000)* (overruling the "injury and pattern discovery rule" of the Sixth, Eighth, Tenth, and Eleventh Circuits); *Klehr v. A.O. Smith Corp., 521 U.S. 179, 187, 138 L. Ed. 2d 373, 117 S. Ct. 1984 (1997)* (overruling the Third Circuit's "last predicate act" rule), it has left our "injury discovery" rule intact. It is important to note, however, that the Supreme Court has explicitly reserved the question of whether

our standard is correct. *See Rotella, 120 S. Ct. at 1080 n.2.*

The plaintiffs argue, and the district court held, that in cases, such as this one, where the injurer and the injured were in a fiduciary relationship with one another, constructive notice does not begin to run the statute of limitations. There is no support for this contention in our cases. In *Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987)*, we affirmed summary judgment against RICO plaintiffs on the ground of constructive notice even though the defendants owed the plaintiffs a fiduciary duty. The defendant responsible for sending the plaintiffs written disclosure of their injury in that case was the general partner of the ventures in which the plaintiffs were limited partners, *see id. at 1409.* Under the mid-1970's Montana law applicable in *Volk* (as with the laws of most states), these partners owed one another certain fiduciary duties. *See* Mont. Code Ann. §§ 35-10-401, 402-405 (1991); *Arnold v. Cremer, 163 Mont. 174, 515 P.2d 957, 960 (Mont. 1973)* (recognizing "rules of law" that partners owe each other fiduciary duties).

The only case cited by Pincay and McCarron here and by the District Court in its opinion and order to support the view that constructive notice does not commence the statute of limitations is a non-RICO decision, *Conmar Corp. v. Mitsui & Co., Inc., 858 F.2d 499 (9th Cir. 1988)*. The relied upon language from *Conmar* reads: "Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Id. at 505* (internal citations omitted). This language, however, is inapposite to the case at hand because the distinction made in *Conmar* between fiduciary relationships and non-fiduciary relationships was with regard to the doctrine of fraudulent concealment, not the doctrine of constructive notice. Although fraudulent concealment may *toll* the statute of limitations, a question

we confront below, that does not settle the question of when the statute of limitations *began to run.* The two questions are analytically distinct. *See Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 276 (9th Cir. 1988).*

We reaffirm the holding in *Volk* that constructive notice begins to run the statue of limitations regardless of any fiduciary relationship between the injured and the injurer. Thus, if no reasonable jury could find that Pincay and McCarron did not have constructive notice of their injuries before 1985, the Andrews are entitled to judgment as a matter of law. n4.

> n4 Pincay and McCarron note that, even if constructive notice could begin to run the statute of limitations in this case, the jury was instructed otherwise and the Andrews failed to object to the instruction. This, however, does not prevent us from reversing the district court's denial of judgment as a matter of law to the Andrews on this ground because, when reviewing a motion for judgement as a matter of law, we apply the law as it should be, rather than the law as it was read to the jury. *See Air-Sea Forwarders, Inc., v. Air Asia Co., Ltd., 880 F.2d 176, 181-83 (9th Cir. 1989).*

[*1110] The injury alleged by Pincay and McCarron was the act of paying more than 5% of their yearly income to the Andrews. "The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Beneficial Standard Life Ins. Co. 851 F.2d at 275.* It is hard to imagine what would constitute "enough information to warrant an investigation" if receiving a written disclosure of one's purported injury does not. As just one example of the many instances in which Pincay and McCarron received written disclosure of their injury, Pincay and McCarron both signed a document in 1980 disclosing that Robert "will receive compensation from the

[venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors." Clearly, as of 1980, both Pincay and McCarron had "enough information to warrant an investigation" into whether the ventures in which they were investing would result in more than 5% of their annual income finding its way into the wallets of the Andrews. Indeed, in *Volk,* we held, as a matter of law, that receiving written disclosure of the possibility of injury was sufficient to put a civil RICO plaintiff on constructive notice of his injury. *See Volk, 816 F.2d at 1412, 1414-15* (affirming summary judgment for defendants on statute of limitations grounds because the plaintiffs were placed on inquiry notice upon "their receipt of the 1978 annual report and the general partner's September 1979 letter"). We follow *Volk* and hold that, as a matter of law, Pincay and McCarron received constructive notice of their injuries at least as early as 1980. Thus, unless the statute of limitations was tolled, Pincay and McCarron's civil RICO claims are time-barred as a matter of law and the Andrews are entitled to judgment as a matter of law.

III

Pincay and McCarron claim that even if the statute of limitations began to run prior to 1985, the statute was tolled until 1988 because the Andrews "fraudulently concealed" information that prevented them from learning of the fraud. "Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases." *Grimmett, 75 F.3d at 514.* "The doctrine is properly invoked only if a plaintiff establishes affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Volk, 816 F.2d at 1415* (internal quotation marks omitted).

Pincay and McCarron cannot prevail on their fraudulent concealment claim in this case because there is a long line of our cases holding that, in order to prevail on such a claim, plaintiffs "must demonstrate that they had *neither actual nor constructive notice* of the facts constituting their claims for relief." *Volk, 816 F.2d at 1415* (emphasis added); *accord Grimmett, 75 F.3d at 514-515* (citing cases). As we decided above, Pincay and McCarron had constructive notice of their injuries prior to 1985 as a matter of law. Thus, they cannot prevail on their fraudulent concealment claim.

IV

Because we conclude that the statute of limitations had run as a matter of law prior to 1989, we need not reach the remaining issues raised by the Andrews regarding the sufficiency of the evidence. Moreover, given that we conclude that their RICO claims were untimely, Pincay and McCarron's cross-appeal raising the issue of election of damages is moot. Finally, our holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to Pincay and McCarron's state law claims. Judgment for Pincay and McCarron is

REVERSED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAFFIT PINCAY, JR.; CHRISTOPHER J. MCCARRON	)	
	)	Nos. 98-55217
	)	98-55288
	)	98-55449
Plaintiffs-Appellees/ Cross-Appellants	)	
v.	)	D.C. No. CV-89-01445-WMB
VINCENT S. ANDREWS; ROBERT L. ANDREW; VINCENT ANDREW MANAGEMENT CORP.	)	
	)	ORDER
Defendants-Appellants/ Cross-Appellees	)	

Filed March 28, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: O'Scannlain, Fernandez, and Rawlinson, Circuit Judges.

The panel has voted unanimously to deny the appellees' petition for rehearing and to deny the appellees' petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-1445-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	ORDER
Defendants.	)	
	)	
CHRISTOPHER J. McCARRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-4965-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	
Defendants.	)	
	)	

Filed
Clerk U.S. District Court
June 29, 1996
Central District of California
By Deputy

I.

BACKGROUND

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The jury

returned a special verdict in favor of all of plaintiffs' claims, including a federal RICO claim and state law claims for breach of fiduciary duty, breach of oral agreement, negligence, fraud, and negligent misrepresentation. The Court entered the judgment in favor of plaintiffs Laffit Pincay ("Pincay") and Christopher J. McCarron ("McCarron") on October 28 and 29, 1993.

Defendants Vincent Andrews, Jr., Vincent Andrews Management Corp. ("VAMC"), and Robert L. Andrews then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. The parties have now informed the Court that the bankruptcy stays have been lifted, and that the motion may be resolved.

II.

STANDARD

A. *Judgment as a Matter of Law*

A judgment as a matter of law is proper "when the evidence permits only one reasonable conclusion as to the verdict." *Garvin v. Greenbank,* 856 F.2d 1392, 1396 (9th Cir. 1988).

> If the evidence, considered as a whole in a light most favorable to the nonmoving party, can support only one reasonable conclusion, then the moving party is entitled to a judgment notwithstanding the adverse verdict. (citation omitted) , . Neither the district court nor (the appeals) court is free to weigh the evidence or reach a result it finds more reasonable if the jury's verdict is supported by substantial evidence."

Id. (citing *Wilcox v. First Interstate Bank of Oregon, N.A.,* 815 F.2d 522, 525 (9th Cir. 1987)).

B. *New Trial*

> The Federal Rules of Civil Procedure provide that (a) new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Fed. R. Civ. P. 59(a).

In granting a Rule 59 motion for a new trial on the basis of a lack of sufficiency of the evidence, the trial court must have a firm conviction that the jury has made a mistake. A court is "not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because [it] feel[s] that other results are more reasonable." *Landes Const. Co., Inc. v. Royal Bank of Canada,* 833 F.2d 1365, 1371-72 (9th Cir. 1987).

III.

DISCUSSION

A. *Procedural Posture of Motion for Judgment as a Matter of Law*

Before reaching the merits, the Court first addresses plaintiffs' procedural attack on defendants' motion for judgment as a matter of law.

Federal Rule of Civil Procedure 50(b) provides that "a motion for a judgment as a matter of law [under Rule 50(a)] made at the close of all the evidence," if denied or not granted by the court, may be renewed by filing a motion not later than 10 days after entry of judgment. Defendants made a written Rule 50(a) motion as to liability issues at the close of plaintiffs' case in the liability trial, and

an oral Rule 50(a) motion as to damages issues at the beginning of the damages trial.

Plaintiffs first contend that defendants' failure to submit a Rule 50(a) motion at the close of "all" the evidence — at the close of the damages trial — precludes defendants from renewing their motion with respect to any issues, including issues relating to liability.

No authority, however, requires that a Rule 50(a) motion addressing the first phase of a bifurcated trial be made after the evidence is presented in the second phase. Moreover, the purpose of Rule 50(b) is to alert "the opposing party to the alleged insufficiency of the evidence at a point in the trial where that party may still cure the defect by presenting further evidence." *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1347 (9th Cir. 1985). Because the two trials here were separate, and each self-contained, there would be no purpose served by requiring the Rule 50(a) motion to have been made with respect to liability during the damages trial. The Court finds that defendants' Rule 50(b) motion as to liability is not procedurally defective.

Defendants orally renewed their Rule 50(a) motion on damages at the close of the evidence in the damages trial. Although the Ninth Circuit endorses a "strict application" of Rule 50(b) in requiring that a motion be renewed at the close of all the evidence in a case, it has also noted that courts are "somewhat more liberal about what constitutes a sufficient motion for a directed verdict at the close of all the evidence." *Id.* The fact that a motion was made orally at the close of the evidence in the damages trial does not render a subsequent Rule 50(b) motion procedurally defective.

Plaintiffs next argue that defendants should not be permitted to base a renewed motion on grounds not included in their prior motions. Thus, plaintiffs reason that only the attack on the RICO claim should be renewable, because the

other arguments were not raised in the prior Rule 50(a) motions.

Defendants correctly note, however, that all of the arguments raised in the instant motion have been previously raised in one form or another. The issues not previously raised in the Rule 50(a) motions were made prior to and during the course of trial, and will now be considered under Rule 59 as grounds for new trial or to alter or amend the judgment.

The Court finds that defendants' motion is not procedurally defective.

B. *RICO "Enterprise" Requirement*

The Court first addresses the only one of defendants' arguments that has merit.

1. *VAMC as both enterprise and defendant*

The Ninth Circuit has held that a RICO enterprise cannot also be a defendant in a section 1962(c) RICO claim[1], the "enterprise" itself cannot also be a "person" who participated in the enterprise. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992), *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984).

The only RICO enterprise identified in the Pretrial Conference Order was VAMC. (Pretrial Conference Order, § 7.B1 at 43). Accordingly, VAMC cannot, as a matter of law, be liable as a "person" under section 1962(c). VAMC

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[1]Section 1962(c) provides as follows: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a patter of racketeering activity.

18 U.S.C. § 1962(c).

is entitled to judgment as a matter of law on plaintiffs' RICO claim.[2]

2. *Dismissal of VAMC only*

That conclusion does not necessarily extend to the other defendants, however. Neither Vincent S. Andrews, Jr. nor Robert L. Andrews were RICO enterprises, so they were arguably RICO "persons" who could be liable under section 1962(c).

During a February 8, 1994 status conference, the Court asked the parties whether they would stipulate to the dismissal of VAMC alone, maintaining the individual defendants as the only RICO defendants. The parties were instructed to brief their arguments if they disagreed on that issue.

Ostensibly in response to the Court's request, plaintiffs filed a "Brief Re Existence of RICO Enterprise" on February 16, 1994. Defendants responded to that brief on February 23, 1994. Neither brief, unfortunately, addresses the question posed by the Court: whether VAMC alone could be dismissed from plaintiffs' RICO claim. The Court will set a conference call with the parties, and may order briefing on that issue.

3. *VAMC and the Andrews defendants as an "association-in-fact" enterprise*

Instead of addressing the issue of whether VAMC alone could be dismissed, plaintiffs' February 16, 1994 filing asserted, for the first time, that the RICO enterprise was not

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[2]Plaintiffs' reliance on *Schreiber Distributing Co. v. Serv-Wall Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986), is misplaced. In *Schreiber*, the Ninth Circuit allowed a RICO "person" and "enterprise" to be the same entity only as to section 1962(a) and (b) offenses, and acknowledged that courts have "consistently held that in an action under § 1962(c), the 'person' must be a separate and distinct entity from the 'enterprise.' " *Id.* at 1396.

VAMC, but rather the association of VAMC with Vincent and Robert Andrews, See 18 U.S.C. § 1961(4) ("enterprise" can be "any union or group of individuals associated in fact although not a legal entity").

Plaintiffs' belated assertion is without merit. Defendants correctly note that the Pretrial Conference Order identified VAMC — and only VAMC — as the RICO enterprise. (Pretrial Order, §7.B1 at 43). Nonetheless, plaintiffs claim that before the liability case was submitted to the jury, plaintiffs revised the theory of their case such that the enterprise comprised VAMC in addition to the Andrews defendants. (*See* Plaintiffs' Brief Re Existence of RICO Enterprise, pp. 2-3).

Notably, plaintiffs cite no trial transcript for this recollection. Instead, they point to question 31 on the Special Verdict Form, which they contend asked the jury whether an enterprise consisting of VAMC and the two Andrews defendants had been proved. Question 31 asked no such thing; it merely asked, "As to each defendant identified below, were any of the defendants associated with or employed by an enterprise that engaged in business in more than one state?" The Special Verdict Form did not define or ask what the enterprise was, it merely asked what defendants were RICO "persons" associated with the enterprise.[3]

Plaintiff's request to amend the Pretrial Conference Order to describe an enterprise consisting of both VAMC and the Andrews defendants is denied. No evidence of the structure

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[3]It is also telling that plaintiffs' February 16, 1994 recollection of their purported mid-trial redefinition of the RICO enterprise came only after the Court expressed its doubts that VAMC could be both a defendant and the enterprise. Before that, on November 22, 1993, plaintiffs maintained that VAMC was "both a person and an enterprise under RICO." (Plaintiff's Opposition, p. 13).

or continuity of such an enterprise was presented to the jury; the jury never found that such an enterprise existed.

4. *Ascertainable structure.*

Defendants also argue that plaintiffs failed to prove an enterprise with an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. That argument is without merit.

The Supreme Court has explained that a RICO " 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *United States v. Turkette,* 101 S.Ct. 2524, 2528 (1981). The *Turkette* Court did not, however, explicitly specify the quantum of structure necessary to constitute a RICO enterprise. Fortunately, the Ninth Circuit has recently elaborated on the "structure" requirement:

> It . . . is not necessary to show that the organization "has some function wholly unrelated to the racketeering activity." (*United States v. Riccobene,* 709 F.2d 214, 223-24 (3d Cir.) (as amended), *cert. denied,* 104 S.Ct. 157 (1983)). Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering. *Id.* at 224.

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996).

The evidence in the instant case met this standard. There was considerable proof of VAMC's structure beyond the racketeering activity itself.[4] *Compare United States v. Feldman,* 853 F.2d 648, 660 (9th Cir. 1988); and *United Energy*

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[4]For example, the parties' "Statement to he Jury Re: Stipulated Facts" sets forth that VAMC is a New York Corporation formed in 1969; that VAMC renders accounting and business management services to clients, including plaintiffs; and that VAMC has offices in New York, Connecticut, and Beverly Hills and employs a staff of about 18.

Owners v. United Energy Management, 837 F.2d 356, 363 (9th Cir. 1988) (sufficient structure apart from racketeering activity, as measured by majority rule subsequently adopted by *Chang*); *with Chang*, 80 F.3d at 1300 (insufficient structure apart from racketeering activity).

C. *Defendants' other arguments*

All of defendants' other arguments are without merit.

1. *Scienter*

Defendants contend that there was insufficient evidentiary support for the scienter required under the mail and wire fraud predicate acts. The requirement of specific intent in those predicate acts can be satisfied by "the existence of a scheme which was reasonably calculated to deceive persons of ordinary prudence and comprehension and this intention is shown by examining the scheme itself." *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984).

The Court finds that "a scheme reasonably calculated to deceive persons of ordinary prudence" was adequately supported by the evidence. The evidence showed that defendants approached plaintiffs and offered to invest their earnings and keep their books in exchange for five percent of their overall income.[5] Defendants then advised plaintiffs to invest in partnerships in which defendants had undisclosed financial interests.

Defendants have not demonstrated that the evidence would reasonably permit only a conclusion against the

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[5]The Court rejects defendants' contention that this oral promise was the only evidence of misrepresentation, and that it should have been barred by the parol evidence rule. The evidence supported a fraudulent scheme broader than the oral misrepresentations. The scheme involved the failure to disclose material information regarding defendants' conflicts of interest with respect to several investments over many years.

requisite level of scienter, nor that the finding of scienter was against the clear weight of the evidence.

2. *Robert Andrews' participation in the VAMC enterprise*

Defendants also contend that, even if an enterprise were shown by the evidence, that Robert Andrews could not be liable under section 1962(c) because he did not participate in the "operation or management of the enterprise itself." *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1172 (1993).

The Court disagrees, and finds that there was sufficient evidence to support the jury's finding that Robert Andrews was involved in the operation and management of VAMC. He and Vince were the only shareholders. Robert was part of the upper-management of VAMC: he had been an officer since the 1970's, serving as the Vice-President and Secretary. (See Statement to the Jury Re Stipulated Facts). Further, Robert held an official position in several of the partnerships that he recommended to Vince for VAMC's clients.

The mere fact that Robert Andrews did not know which clients' investments went to which partnership, or that he never told Vince precisely how to advise their clients, does not negate the jury's factual finding that he participated in the operation or management of the enterprise through a fraudulent scheme. Robert need not have had total control of every aspect of VAMC to have satisfied the "operation or management" test. *See Reves*, 113 S.Ct. at 1173 ("An enterprise in 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management").

3. *Pattern of racketeering activity*

To satisfy the requirement of a "pattern of rackateering activity," a plaintiff must show that the alleged predicate acts are (1) related to each other, and (2) amount to a

continued criminal activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.,* 109 S.Ct. 2893, 2901 (1989). Defendants argue that the second element, the "continuity" requirement, was not met.

The evidence showed that defendants had a long-term financial association with both plaintiffs. Between 1968 and 1987, plaintiffs entered into 55 written contracts (42 for Pincay, 13 for McCarron) through which they purchased limited partnership interests offered to them by VAMC and Vincent Andrews, Jr. Defendants had financial interests in many of the partnerships at the times it recommended them to plaintiffs.

Contrary to defendants' assertions, no authority requires that clients other than plaintiffs must have been defrauded in order to support a finding of the requisite "continuity." The evidence adequately supported the jury's finding of a "pattern of racketeering activity" by defendants with respect to plaintiffs alone.

4. *Proximate causation of damages*

The proper measure of a prevailing plaintiffs' RICO damages is the harm "directly" or "proximately" caused by the alleged RICO violations. *See Holmes v. Sec. Investors Protection Corp.,* 112 S.Ct. 1311, 1317-18 (1992). Defendants contend that the damages awarded here were, as a matter of law, not proximately caused by the predicate acts.

The Court disagrees, and finds that there was sufficient evidence to proximate cause between the alleged misrepresentations by defendants and plaintiffs' damages. Plaintiffs were the direct objects of defendants' various misrepresentations, they were not injured third-parties, as in *Holmes.* There was evidence showing that defendant's alleged fraudulent acts proximately induced plaintiffs to invest in numer-

ous partnerships in which defendants had a financial interest.[6]

5. *Statute of limitations*

The statute of limitations period for civil RICO claim is four years. *See Agency Holding Corp. v. Malley-Duffy & Assoc.*, 107 S.Ct. 2759, 2767 (1987). A RICO claim accrues when the plaintiff knew or had reason to know of the injury that is the basis of the action. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988). Defendants, relying primarily on *Volk v. D.A. David-*

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[6]Defendants urge the Court to impose the proximate causation rule articulated by the Fifth Circuit with respect to an alleged violation of Rule 10b-5 of the Securities Exchange Act. The Fifth Circuit has stated that:

> The plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value. If the investment decision is induced by misrepresentations or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under the Rule is not permitted.

Huddleston v. Herman & McLean, 640 F2d 534, 549 (5th Cir. 1981), *aff'd in relevant part, rev'd in part*, 459 U.S. 375 (1982).

Huddleston, however, addressed Rule 10b-5, and has never been applied by the Ninth Circuit to RICO actions. Moreover, the Ninth Circuit declined to apply the *Huddleston* rule to a Rule 10b-5 "churning case," in which the defendant's liability arose from its recommending purchases in order to generate commissions, not from its inducing purchases for more than the stocks were worth. The court reasoned that the plaintiff "should not have to prove loss causation where the evil is not the price the investor paid for a security, but the broker's fraudulent inducement of the investor to purchase the security." *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 773 (9th Cir. 1984).

The court declines to apply the *Huddleston* rule here.

son & Co., 816 F.2d 1406 (9th Cir. 1987), contend that the evidence showed that plaintiffs had reason to know of their claims long before four years prior to the time their cases were filed.[7]

Volk, however, is distinguishable.[8] In the instant case, the documents that plaintiffs received never disclosed the full scope of the conflicts of interest nor the possible adverse consequences for plaintiffs as investors. Moreover there were fiduciary aspects to the relationship between plaintiffs and defendants in the instant case which were not raised in *Volk*. The existence of a fiduciary relationship is relevant because, as the Ninth Circuit has explained, "[p]assive concealment of information is not enough to toll the statute of limitations unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Conmar Corp. v. Mitsui & Co.*

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[7]Defendants note that plaintiff Pincay testified that in 1978 he noticed from a document that Andrews & Company, which he understood to involve Vincent Andrews, was the managing partner of one of the partnerships. (Tr. 89). Pincay also acknowledged that he read a one-page acknowledgment of compensation form for Taber Mill in 1980, disclosing Robert Andrew's compensation. (Tr. 93). Plaintiff McCarron testified that he had a "standard practice" of reading documents sent to him by VAMC (Tr. 220), and that the second partnership document he received referred to Robert Andrew's interest in the partnership. (Tr. 231.)

[8]In *Volk*, 816 F.2d at 1409-12, the plaintiffs had invested in various limited partnerships, each organized to acquire and develop coal leases in Utah. Those partnership interests were marketed as tax shelters. In an annual report sent to plaintiffs, the general partner disclosed that the partnership properties contained less coal reserves than originally represented, and that the IRS had questioned the commercial viability of the mining operations, such that the propriety of certain favorable tax deductions was jeopordized. The report explained the details of the problem and a broad scope of consequences to the investors. The Ninth Circuit held that receipt of the report gave the *Volk* plaintiffs constructive knowledge of their fraud claims.

(U.S.A.). Inc. 858 F.2d 499, 505 (9th Cir. 1988) (citations omitted), *cert. denied.* 109 S.Ct. 795.[9]

Given the circumstances in this case — in particular the type of relationship that plaintiffs and defendants shared the subtle manner that defendants' interests were "disclosed" to plaintiffs and defendants' reassurances to plaintiffs — the Court concludes that plaintiffs' claim did not, as a matter of law, accrue upon their first learning that defendants held an interest in a recommended investment. The jury could have reasonably found that the plaintiffs' RICO claims were not time-barred.

6. *Damage calculations*

Defendants contend that a new trial is justified with respect to damages for two reasons. Neither is persuasive.

a. *Present value of partnerships*

Defendants content that plaintiffs claims of the illiquidity of their investments were factually wrong and legally irrelevant. Furthermore, they argue that even if the investments were illiquid, the partnerships still had value, the present value of which should have been taken into account in the damages calculation.

Plaintiffs persuasively respond that defendants had an opportunity to present evidence of the value of the partnerships at trial. Moreover, defendants' own witnesses Michael Fried and John Wairweiss testified that the investments

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[9]*Conmar,* 858 F.2d 499, was not a RICO case. There is no Ninth Circuit law that establishes the standard for "knowledge" to be applied in a statute of limitations analysis of a RICO claim, where the plaintiff had a fiduciary relationship with defendants and placed substantial trust and confidence in them. There is no binding authority, then, on whether the requisite "knowledge" needs to be knowledge of facts amounting to "pervasive fraud," as plaintiffs argue, or merely of facts that defendants had a stake in the investments.

were illiquid and that they could not specify a place where the investments could be sold. In addition, Vincent Andrew testified that he had told plaintiffs that their investments were not "readily saleable" and not liquid.

The Court finds that the jury's assessment of the partnerships' value was not clearly erroneous or against the clear weight of the evidence.

b. *Tax benefits*

Next, defendants contend that evidence of plaintiffs' tax benefits should have been considered in the damages calculation, particularly because the tax benefits were part of the motivation for plaintiffs' investments.

In *Randall v. Loftsgaarden,* 106 S.Ct. 3143, 3149 (1986), the Supreme Court held that section 12(2) of the Securities Exchange Act, in providing for an offset of "income received" on a security against money returned to a plaintiff, does not "encompass the tax benefits received by defrauded investors by virtue of their ownership of the security, because such benefits cannot, under any reasonable definition, be termed 'income.' " *See also Fleischauer v. Feltner,* 87 F.2d 1290, 1300-1301 (6th Cir. 1989), *cert. denied* 493 U.S. 1074 (1989).

Defendants argue that *Randall* is distinguishable because that case involved an interpretation of a statute's definition of "income received" and the calculation of a rescissionary measure of damages, as opposed to the compensatory damages at issue here. The Ninth Circuit has not decided whether, after *Randall,* RICO compensatory damage awards should be reduced by tax benefits received. In the absence of such precedent, the Court declines to grant judgment as a matter of law or a new trial on this ground.[10]

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[10]Defendants cite cases outside the Ninth Circuit that arguably support their position that plaintiffs' damages should have been offset by

7. Other evidentiary rulings

Defendants next contend that two purportedly erroneous evidentiary rulings warrant a new trial.

First, defendants argue that they were improperly prevented from presenting evidence regarding plaintiffs' other business dealings and their overall financial picture. The Court finds that such evidence was properly excluded as irrelevant to the conduct at issue. *See* Fed. R. Evid. 401, 402.

Defendants also contend that the Court erred in permitting plaintiffs' expert witness Costello to attend trial. *See* Fed. R. Evid. 615. Even assuming that Costello should have

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tax benefits received. In *Salcer v. Envicon Equities,* 744 F.2d 935, 940-42 (2d Cir. 1984), the court stated that tax benefits received from limited partnerships must be deducted in calculating damages. *Salcer,* however, was decided before *Randall,* and the holding was specifically vacated by the Supreme Court and remanded in light of *Randall.*

Burdett v. Miller, 957 F.2d 1375, 1383 (7th Cir. 1992), is more helpful to defendants. It held that when seeking damages arising from a fiduciary's breach of duty with respect to tax shelters, a damage award cannot include the "anticipated, and realized, tax benefits of the tax shelters. . . . The essential point is that with regard to benefits of whatever sort that are promised and received, there is no injury, so no basis for a claim of damages."

Burdett was, by its own concession, a departure from the general rule that potential tax effects are irrelevant to damage calculations. *See id.* at 1383.

Burdett has not been followed in the Ninth Circuit. Moreover, the Ninth Circuit in *Volk* concluded that RICO does not provide plaintiffs with a means for recovering lost tax savings which were expected from limited partnership tax shelters. The court explained that *what was sold to investors were not tax savings,* and that *the predicate acts,* the securities violations *did not cause the loss of tax benefits. Volk,* 816 F.2d at 1415. That reasoning suggests that defendants may not claim tax savings as an offset to a RICO damages award.

been excluded, the Court finds defendants' conclusory allegation of prejudice unconvincing.

8. *Jury confusion*

Defendant's final contention is that the jury's findings were confused, and demonstrated that the jury failed to properly consider the evidence or follow the Court's instructions.

When a party challenges a jury verdict, the Court, in reviewing the verdict, has a "duty to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence." *Ortiz v. Bank of American National Trust & Savings Ass'n,* 852 F.2d 383, 388 (9th Cir. 1988) (holding that special verdict did not reflect "hopeless conflict or confusion").

Here, the jury found that plaintiff Pinoay would not have invested in certain partnerships if he had known of concealed facts. The selection of only those certain partnerships is reasonably consistent with the evidence. Similarly, the jury's finding of both negligent and intentional misrepresentation is not, as defendants contend, "blatantly inconsistent." Defendants made many representations, with respect to numerous transactions, over many years. It is not implausible that the jury found defendants both negligent and intentional in their misrepresentations.

The Court denies defendants' request for a new trial based on jury confusion.

IV.

CONCLUSION

Defendants' motion for judgment as a matter of law is GRANTED with respect to defendant VAMC on plaintiffs' RICO claim. The Court does not rule with respect to the RICO claim against the other two defendants.

Defendants' motion is DENIED in all other respects.

The Court orders a conference call with the parties on Tuesday, July 9, 1996 at 2:00 p.m., and may thereafter set a briefing schedule on two issues: (1) whether the dismissal of defendant VAMC from plaintiffs' RICO claim necessitates either judgment for the other defendants as a matter of law on the RICO claim, or a partial new trial; and (2) whether plaintiffs' prior election of RICO remedies may now be revoked. The Court will place the conference call.

Date: June 28, 1996 /s/ WM. MATTHEW BYRNE, JR.

Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAFFIT PINCAY, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-1445-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	ORDER
	)	GRANTING
	)	PLAINTIFF'S
	)	MOTION
Defendants.	)	FOR
	)	RECONSIDERATION
	)	
CHRISTOPHER J. MCCARRON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 89-4965-WMB
	)	
VINCENT S. ANDREWS, et al.,	)	
	)	
Defendants.	)	
	)	

Filed
Clerk, U.S. District Court
August 15, 1997
Central District of California
By Deputy

Entered
Clerk, U.S. District Court
August 18, 1997
Central District of California
By Deputy

I.

BACKGROUND

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The jury returned a special verdict in favor of all of plaintiffs' claims, including a federal RICO claim and state law claims for breach of fiduciary duty, breach of oral agreement, negligence, fraud, and negligent misrepresentation. The Court entered the judgment in favor of plaintiffs Laffit Pincay ("Pincay") and Christopher J. McCarron ("McCarron").

Defendants Vincent Andrews, Jr., Vincent Andrews Management Corp. ("VAMC"), and Robert L. Andrews then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. After the bankruptcy stays were lifted, the Court granted VAMC judgment as a matter of law on plaintiffs' RICO claim and denied defendants' motion in all other respects.

Plaintiffs now move for reconsideration of that decision. The parties have briefed other post-trial issues, including whether the individual defendants are entitled to a new trial or judgment as a matter of law in light of the judgment for VAMC and whether plaintiffs' election of RICO remedies should be considered binding.

II.

MOTION FOR RECONSIDERATION

A. *Legal Standard*

Reconsideration is generally a matter for the discretion of the Court, *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th

Cir. 1991). It is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *School District No. 10, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A court may reconsider an interlocutory order at any time. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 907 F.Supp. 1349, 1353 (N.D. Cal. 1995) ("Reconsideration is justified if . . . there is a need to correct clear error or to prevent manifest injustice.").

In this case, plaintiffs argue that the Court's decision to grant judgment as a matter of law to VAMC was clearly erroneous. Because no final judgment has been issued for VAMC, the Court's decision was an interlocutory one. *See id.*

B. *Discussion*

Robert Andrews, Vincent Andrews, and VAMC are liable under the RICO statute if they were associated with "any enterprise" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). In the Pre-Trial Conference Order, plaintiffs identified VAMC as the only RICO enterprise involved in the case. The Ninth Circuit has held that a RICO enterprise cannot also be a defendant in a § 1962(c) RICO claim; the "enterprise" itself cannot also be a person who participated in the enterprise. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992); *Rae v. Union Bank*, 725 F.2d 478, 480-81 (9th Cir. 1984). The Court has ruled that "VAMC cannot, as a matter of law, be liable as a 'person' under § 1962(c) . . VAMC is entitled to judgment as a matter of law on plaintiff's RICO claim." (June 29, 1996, Order at 5.)

Plaintiffs do not dispute that VAMC could not be a RICO enterprise and a defendant in the case. However, they argue that judgment should be reinstated against VAMC based upon another RICO enterprise theory. Plaintiffs now contend that they presented evidence to the jury of a RICO enterprise composed of an association-in-fact of VAMC, Vincent Andrews, and Robert Andrews. Plaintiffs argue that the jury instructions and verdict indicate that the jury was presented with and persuaded by this association-in-fact theory.

Where "[f]acts supporting the court's findings and conclusions were before the court and were argued . . . [a] court properly may consider the pleadings and pretrial order to have been amended to conform to the evidence presented." *Sauers v. Alaska Barge* 600 F.2d 238, 244 (9th Cir. 1979). However, in its June 29 Order, the Court concluded that

> [p]laintiff's request to amend the Pretrial Conference Order to describe an enterprise consisting of both VAMC and the Andrews defendants is denied. No evidence of the structure or continuity of such an enterprise was presented to the jury; the jury never found that such an enterprise existed.

(June 29, 1996, Order at 7-8.).

Plaintiffs have identified new support for their argument. They contend that the jury instructions given by the Court indicate that they presented the association-in-fact theory to the jury. They have also identified portions of the closing arguments discussing their RICO claim in support of their contention. The jury was instructed that

> Plaintiffs contend that defendant Vincent Andrews Management Corporation was both a person liable under RICO and an enterprise which affect interstate or foreign commerce, and that defendants Robert Andrews and Vincent Andrews participated in this enter-

> prise through a pattern of racketeering activity. *Plaintiffs also claim that all three defendants were associated-in-fact as an enterprise that affected interstate or foreign commerce, and that all three defendants participated in this enterprise through a pattern of related activity.* Defendants deny these contentions.

(emphasis added).

The court has an obligation to read the verdict harmoniously with the jury instructions given. *Interstate Markings, Inc., v. Mingus Constructors, Inc.*, 941 F.2d 1010, 1013 (9th Cir. 1991). It must draw all possible inferences in favor of the jury's verdict and findings, *Donoghue v. Orange County*, 848 F.2d 926, 932 (9th Cir. 1988) (motion for directed verdict).

C. *Elements of Plaintiffs' RICO Claim*

To establish a RICO claim, plaintiffs were obligated to prove "1) that the defendant[s], 2) through the commission of two or more acts, 3) constituting a 'pattern,' 4) of 'racketeering activity,' 5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participate[d] in, 6) an 'enterprise,' 7) the activities of which affect[ed] interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2nd Cir. 1983).

1. *Predicate Acts*

Plaintiffs argue that the predicate acts committed here were the investment recommendations made to them by defendants without disclosure of defendants' partnership interests. They contend that more than two of these recommendations were made in violation of the mail and wire fraud statutes.

2. *Pattern*

Plaintiffs had to establish that the acts constituted a "pattern," which has been interpreted by the Ninth Circuit

to create a test whether the acts of the defendants were related and posed a threat of continuing activity. *Ikuno v. Yip,* 912 F.2d 306, 309 (9th Cir. 1990); *Sun Sav. & Loan Ass'n v. Dierdorf,* 825 F.2d 187, 192 (9th Cir. 1987).

The evidence showed that defendants had a financial relationship with both plaintiffs that lasted for two decades. That relationship extended to a number of ventures in which defendants had financial interests at the time they recommended them to plaintiffs.[1] Plaintiffs presented evidence at trial that defendants failed to adequately disclose those interests to them. These recommendations were made in a similar fashion and continued over the course of a number of years.

Plaintiffs presented their pattern argument to the jury. In their closing argument, plaintiffs contended

> there has to be a pattern. Here we have a pattern in Laffit's case of over 18 years, a pattern I would submit to you is very clear. It was here. There was knowingly an attempt to deceive.

(Transcript, July 29, 1992, at 32.). Plaintiffs satisfied the pattern element of their claim.

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[1]For example, the Pre-Trial Conference Order states that VAMC was compensated for performing accounting services and had a wholly-owned subsidia serve as a general partner for one of the partnerships in which plaintiffs invested. (Pre-Trial Conference Order, at 16-17, 23.) Robert Andrews and companies owned by him received fees from or participated in various limited partnerships. (Pre-Trial Conference Order, at 5, 9-11, 14-15. 20-24, 26-32, and 34-37.) Vincent Andrews also made money in various partnerships with the plaintiffs as a limited partner, a general partner, and a president or stockholder of corporate general partners. (Pre-Trial Conference Order, at 4, 9, 11-12, 14, 17-21, 25, and 33-34.).

3. *Racketeering Activity*

For RICO purposes, the term "racketeering activity" incudes a broad assortment of federal crimes, including the acts of mail and wire fraud alleged here. 18 U.S.C. § 1961(1)(B).

The mail and wire fraud statutes provide that anyone who devises "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises and uses the mail or wires to do so shall be fined not more than $1,000 or imprisoned for not more than five years, or both. 18 U.S.C. §§ 1341, 1343. Plaintiffs presented evidence to the jury that defendants presented investment opportunities to plaintiffs over the telephone and through the mails without disclosing their financial interests in those investments. The jury could have concluded that this evidence met the requirements set forth in the mail and wire fraud statutes.

To the extent that plaintiffs established that defendants committed mail and wire fraud, they have satisfied the racketeering element of the claim.

4. *Enterprise*

RICO defines "enterprise to "includ[e] . . . any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To establish the existence of an association-in-fact enterprise, plaintiffs had to establish that the members of the enterprise "share[d] a common purpose of engaging in a course of conduct" and produce "evidence of an ongoing organization, formal or informal, and . . . that the various associates function[ed] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Plaintiffs presented their association-in-fact argument to the jury, albeit confusingly, in their closing argu-

ment. With regard to "evidence of an ongoing organization," plaintiffs argued that

> [t]he people have to be employed by or in association with the enterprise. Well, there is no doubt about that, VAMC's relationship with Robert and with Vinny and the association with the conspiracy.

(Transcript, July 29, 1992, at 32.). Though plaintiffs initially observed that the association was somehow separate from the enterprise, by analyzing the agreement with the three defendants as a "relationship" and an "association" plaintiffs presented evidence of an association-in-fact to the jury in accordance with the jury instructions.

Plaintiffs also argued that

> VAMC was the vehicle that was used for all of these transactions. That is, they acted independently as a group. That sounds like it is a contradiction, but VAMC acted through Vinny, through Robert, and they acted themselves.

(Transcript, July 29, 1992, at 35.).[2] Here, plaintiffs described each of the three defendants as independent actors operating with one another. Each defendant "acted independently," but as a whole, they operated "as a group." Plaintiff's closing argument identified their association-in-fact claim of an ongoing, informal enterprise comprised of VAMC and its officers for the jury.

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[2]Enterprises composed of a corporation and its officers are not without precedent in the Ninth Circuit. The circuit has held that individual officers of a corporation can form an association-in-fact with the corporation. *U.S. v. Feldman,* 853 F.2d 648, 655-56 (9th Cir. 1988). Nor must the corporation be devoted entirely to illegal ends to do so. A corporate member of an association-in-fact "may be entirely legitimate and need not benefit from the racketeering." *Id.* at 657.

Plaintiffs also had to also show that the enterprise existed "separate and apart from the pattern of activity in which it engages" to prove their association-in-fact claim. *Turkette,* 452 U.S. at 583. To establish separate existence,

> it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering .... The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996). The Ninth Circuit has held that an association-in-fact of corporate entities and their officers has an ascertainable structure separate from racketeering. *United States v. Feldman,* 853 F.2d 648, 660 (9th Cir. 1988) (because corporation has a legal existence separate from its participation in racketeering, "the very existence of a corporation meets the requirement for a separate structure").[3]

Plaintiffs' closing argument referred to the separate existence of the enterprise and its activities other than those involving plaintiffs.

> Obviously, they talked with each other, *with other persons,* with themselves, with the plaintiffs, and there has to be a pattern.

(Transcript, July 29, 1992, at 32.) (emphasis added). Plaintiffs presented evidence to the jury from which it could

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[3]Plaintiffs observe that the Pre-Trial Conference Order established that the individuals involved in the conspiracy carried out functions in its furtherance separate from their corporate functions. That order stated that "Robert Andrews has been involved in finance and real estate since the middle '70's. These are separate endeavors from VAMC." (Pre-Trial Conference Order, at 5.).

conclude that the association-in-fact had a separate existence apart from the pattern on activity in which it engaged.

5. *Participation*

Section 1962(c) prohibits persons employed by or associated with an enterprise from conducting or participating in the conduct of the affairs of that enterprise through a pattern of racketeering activity. To prove participation, plaintiffs had to demonstrate the existence of a relationship between the pattern of racketeering activity and the enterprise. This nexus exists "when 1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or 2) the predicate offenses are related to the activities of the enterprise." *United States v. Sciotto,* 641 F.2d 47, 54 (2nd Cir. 1981); *Dierdorff,* 825 F.2d, at 195 (quoting *Sciotto*).

Defendants located and sold investment opportunities to plaintiffs without disclosing their interests in those investments. Those predicate offenses were related to the activities of the enterprise, which located and sold investments for a number of different clients, including plaintiffs.

6. *Interstate Commerce*

Finally, plaintiffs had to show that the racketeering activity must have some effect on interstate commerce. 18 U.S.C. § 1962(c). Plaintiffs presented evidence to the jury outlining the multistate investments made by plaintiffs with defendants' advice. In their closing argument, plaintiffs observed that

> [i]nterstate commerce just means you use the mails. You use the telephone. We have already been through that. I don't think there is any doubt about that. They certainly did business in more than one state. You heard them say they were in New York and Connecti-

> cut, and they were out here in California, and these businesses are in various other states.

(Transcript, July 29, 1992, at 31-32.) Plaintiff satisfied the interstate commerce element of the RICO offense.

D. *Conclusion*

In light of the jury instructions, the evidence presented by plaintiffs, and the closing argument delivered by their counsel, the Court's decision to grant judgment as a matter of law to defendant VAMC constituted clear error. *ACandS, Inc.*, 5 F.3d at 1263. Because the Court must read the verdict harmoniously with the jury instructions given and draw all possible inferences in favor of the jury's verdict and findings, plaintiff's motion for reconsideration is granted. *Mingus Constructors*, 941 F.2d at 1013; *Donoghue*, 848 F.2d at 932. The portion of the Court's June 29, 1996 Order granting judgment as a matter of law to defendants on plaintiffs' RICO claim is hereby vacated.

III.

JUDGMENT AS A MATTER OF LAW FOR ROBERT AND VINCENT ANDREWS

Defendants' motion for judgment as a matter of law as to Robert and Vincent Andrews was predicated on the dismissal of VAMC as a defendant. The Court has reconsidered that dismissal and finds that plaintiffs did present evidence of an association-in-fact RICO enterprise composed of the Andrews brothers and VAMC.

"Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is." *Garrison v. U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The standard for granting a directed verdict under Rule 50(a) mirrors the standard for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Robert and Vincent Andrews are liable under the RICO statute if they were associated with "any enterprises" engaged in interstate commerce to conduct or participate "directly or indirectly" in the conduct of the enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962(c). The jury found, after considering the evidence, that the Andrews brothers were associated in fact with VAMC and that that enterprise engaged in racketeering activity. Substantial evidence supported that finding. Defendants had a long-term financial association with both plaintiffs. Between 1968 and 1987, plaintiffs entered into 55 written contracts (42 for Pincay, 13 for McCarron) through which they purchased limited partnership interests offered to them by VAMC and Vincent Andrews. Defendants had financial interests in many of the partnerships at the time they were recommended to plaintiffs.

Defendant's motion for judgement as a matter of law is denied.

IV

MOTION FOR A NEW TRIAL FOR ROBERT AND VINCENT ANDREWS

Because defendants' motion for a new trial was also predicated on the dismissal of VAMC as a defendant, it is also denied. "Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." *Garrison v. U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); 9A Wright & Miller, *Federal Practice and Procedure* § 2531.

The jury concluded that a RICO enterprise composed of the three defendants existed as an association-in-fact. That verdict was not contrary to the clear weight of the evidence and did not constitute a miscarriage of justice.

V.

ELECTION OF REMEDIES

Defendants argue that plaintiffs' election of RICO remedies before the resolution of the post-trial issues ought to be considered binding upon them now. However, "it ought to be obvious that, when a plaintiff erroneously thinks that a certain remedy is available to him, his futile attempt to procure it by legal proceedings ought not to be described as an election between alternative remedies. . . ." *Warren Company v. Neel,* 184 F. Supp. 203, 212 (W.D. Ark. 1968).[4] This is particularly so in the context of RICO, because RICO remedies are cumulative and supplemental to common law remedies. *Arabian American Oil Co. v. Scarfone,* 939 F.2d 1472, 1478 (11th Cir. 1991)

Plaintiffs' election of RICO remedies is not binding. They may within fifteen (15) days make a new election of remedies in light of this Order if they desire.

Date: Aug 13, 1997 /s/ WM. MATTHEW BYRNE, JR.
Wm. Matthew Byrne, Jr.
United States District Judge

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[4] Cases holding parties to binding elections of remedies are rare. In California, "the doctrine of election of remedies . . . has been repeatedly criticized and seems to be falling into disfavor. Late California decisions illustrating binding election are comparatively rare. . . ." 3 Witkin, *California Procedure* § 132, p.160.